



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. 481 OF 2017

PATCAB TOURS.....1ST PLAINTIFF

PATRICK MAINA WANJAU.....2ND PLAINTIFF

VERSUS

FAMILY BANK TOURS.....1ST DEFENDANT

LEAKEY'S AUCTIONEERS.....2ND DEFENDANT

RULING

(1) Before this Court is the Notice of Motion dated 5th March 2019 in which **PATCAB TOURS LIMITED** and **PATRICK MAINA WANJAU** (herein after jointly referred to as “**the Plaintiff/Applicants**”) seek the following Orders:-

“1. SPENT

2. SPENT

3. **THAT the Honourable court be pleased to stay proceedings pending the mediation process.**

4. **THAT the suit be referred to mediation.**

5. **THAT parties appoint a Mediator to determine the dispute within 30 days from the date of granting the order herein in accordance with General Terms and Conditions for the loan facility in default thereof the court does order the Chairman of the Chartered Institute of Arbitrators to appoint a Mediator.**

6. **THAT the costs of this application be in the cause.**

(2) The application was premised on **Sections 4,6, and 10** of the **Arbitration Act** and **Rules 2,3 and 11** of the **Arbitration Rules, 1997** and all enabling provisions of law. The same was supported by the Affidavit sworn on even date by **LILIAN NJOKI MAINA**, a Director of the 1st Plaintiff/Applicant.

(3) **FAMILY BANK LIMITED** (the Defendant/Respondent) strenuously opposed the application by way of the Replying Affidavit dated 9th April 2018, sworn by **ANTHONY OUMA**, an Advocate of the High court of Kenya.

(4) Pursuant to directions given by the Court, the application was canvassed through written submissions. The Plaintiff/Applicant filed their written submissions on 13th November 2018 whilst the Defendant/ Respondent filed their submissions on 11th December 2018. On 4th February 2019 counsel for both parties appeared in court to highlight those written submissions.

BACKGROUND

(5) The genesis of this dispute is a loan facility advanced by the Defendant/Respondent to the Plaintiff/Applicants in the amount of **Kshs.23,000,000/=**. This loan was secured by a charge over the property known as **LR. NO. Nairobi/Block 105/7646** situated in Capital Hill Area, Embakasi, Nairobi. This loan was to be paid for sixty (60) months at the banks prevailing rate of 23% per annum on a reducing balance. The facility was to be repaid by monthly instalments of **Kshs.648,581/=**. The Plaintiff/ Applicants fell into arrears on the loan

repayments. Accordingly the Defendant/Respondent moved to realize their security.

(6) On or about **17th October 2017**, the Plaintiff/Applicants received a 45 day redemption notice failure to comply with which the statutory power of sale over the charged property would be exercised. The Plaintiff/Applicants disputed the amount claimed as due and owing from themselves to the bank and they rushed to court vide the Notice of Motion dated **29th November 2017** and filed on **30th November 2017** seeking an interim injunction prohibiting the sale of the charged property. On **11th December 2017**, **Hon Lady Justice Olga Sewe** granted the interim injunction sought by the Plaintiff/Applicants subject to certain conditions. The matter was then scheduled for inter partes hearing on the application for stay. The Plaintiff-Applicant then filed this present application seeking to refer the matter to mediation.

(7) The Plaintiff/Applicant avers that the loan Agreements dated **30th October 2015** and the one dated **23rd December 2016**, both contain a Clause directing that any dispute between the parties should be referred to mediation. They urge the court to stay the current proceedings so as to give mediation a chance.

(8) The Defendant/Respondent terms the present application as fatally defective, vexatious, devoid of merit and submits that the same has been brought in bad faith. The Defendant/Respondent claims that the Plaintiff/Applicants have no real or genuine desire to have the matter resolved through mediation, rather their intent in filing the present application is merely to delay the inter partes hearing of the application seeking an interim injunction and to frustrate the exercise by the bank of its statutory power of sale.

ANALYSIS AND DETERMINATION

(9) I have considered the submissions filed by both parties in this matter as well as the relevant statute and case law. Two questions arise for determination:

- (i) Whether there is a dispute capable of being referred to mediation?
- (ii) Whether the dispute between the parties ought to be referred to mediation.

(10) The Letter of Offer from the Defendant/Respondent dated **30th October 2019** in its Annexure contained a clause on Alternative Dispute Resolution in the following terms:-

“The Parties to this letter of offer shall, in the first instance, use their best endeavours to resolve any dispute within 2 (two) Business Days of the dispute having been referred.

In the event that the parties attempt, but fail to solve a dispute pursuant to their good faith efforts, then such dispute shall be submitted to alternative dispute resolution including mediation and/or arbitration. The place of arbitration shall be in Nairobi, Kenya and the procedure shall be subject to the rules of the Chartered Institute of Arbitrators (Kenya Branch) with all proceedings being conducted in the English Language.

Nothing in this Agreement shall preclude either party from obtaining interim relief on an urgent basis from a Court of competent jurisdiction. The decision in arbitration proceedings shall be final and binding on the Parties.

The costs of any reference to arbitration will be borne by the unsuccessful Party, unless otherwise determined by the Parties or the arbitrator, irrespective of which Party referred the dispute to arbitration.

The Plaintiff/Applicant submits that the parties are bound by this loan agreement, specifically the terms relating to alternative dispute resolution and as such the present proceedings ought to be stayed until mediation has been given a chance in the matter.

(11) Aside from the loan agreement signed by the parties, the courts do have an obligation and mandate to promote **ADR** in all matters that come before them. **Article 159(2) (c)** of the **Constitution of Kenya, 2010** provides that:-

“(2) In exercising judicial authority, the courts shall be guided by the following principles:-

(a)

(b)

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to Clause (3).”

(12) Similarly **Section 59(c)** of the **Civil Procedure Act, Cap 21** Laws of Kenya provides as follows:-

“(1) Any suit may be referred to any other method of dispute resolution where the parties agree and the court considers the case suitable for such referral.

(2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves agree to or as the court may in its discretion order.

(i) **Is there a Dispute for Mediation**

(13) In **TM AM CONSTRUCTION GROUP (Africa) –VS- ATTORNEY GENERAL [2001] E.A 282, Mbaluto J.** (as he then was) observed that:-

“A party who is wholly unable to produce the manifest evidence to support an allegation of a dispute in a contract of that magnitude evidenced in this matter has absolutely no right to come to this Court and seek a stay of proceedings and reference to arbitration allegedly because he for the first time alleges that there is a dispute between the parties.”

(14) The Plaintiff/Respondent claims that there is a dispute between the parties capable of being referred to mediation. On the other hand the Defendant/ Respondent submits that there is no current dispute capable of mediation as the issues involved have already been dealt with by the court. The Court did on **11th December 2017** grant a temporary interim injunction which was subject to certain conditions being met. These conditions included:-

“(4) The Defendant to ascertain the exact extent of the amount in arrears and to inform the Plaintiff for payment within 14 days of the date hereof and to continue paying the monthly instalments pending the hearing and determination of this application.”

(15) Following the Court appearance of **11th December 2017**, by the letter dated **14th December 2017** (annexture “AO-3” to the Replying Affidavit dated **15th February 2019**) the Defendant/Respondent did inform the Plaintiff/ Applicant that the loan arrears stood at **Kshs.3,212,935/=**. The Plaintiff/Applicants did not however continue to make the monthly payments as directed by the Court.

(16) On **9th March 2018** those interim injunctive orders were vacated due to consistent non-compliance by the Plaintiff/Applicant of the conditions set by the Court. By vacating those interim orders, the court gave the Defendant/Respondent the green light to proceed to realize their security through exercise of the statutory power of sale. Therefore according to the Defendant/ Respondent the issue of recovery has already been dealt with by the Court.

(17) The Plaintiff/Applicant in propounding the fact that there exists as dispute capable of being referred to arbitration maintain that the amount due and payable to the Defendant/Respondent is not clear. They also question the transparency of the valuation report relied upon by the Defendant/Respondent claiming that said report was skewed in favour of the Bank. Not surprisingly the Defendant/Respondent deny all the above allegations. It is clear therefore that there does exist a dispute between the parties, the vacation of the interim injunctive orders notwithstanding. This is a dispute which in my view is capable of being taken for mediation.

(ii) **Stay of Proceedings**

(18) Having determined that there does exist between the parties a dispute capable of mediation, the next question is whether the present proceedings ought to be stayed in order to allow the mediation process to proceed. In **KENYA POWER & LIGHTING COMPANY LIMITED –VS- ESTHER WANJIRU WOKABI [2014] eKLR** it was held:-

“As I understand the Law, whether or not to grant a stay of proceedings on a decree or Order appealed from is a matter of judicial discretion to be exercised in the interest of justice...The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the Court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of case, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the Application has been brought expeditiously.” [own emphasis]

(19) Further in **Winding Up Cause No.43 of 2000**, in the Matter of **Global Tours & Travels Limited** the **Honourable Justice Ringera** (as he then was) held as follows:-

“As I understand the Law, whether or not to grant a stay of proceedings on a Decree or Order appealed from is a matter of judicial discretion to be exercised rationally and not capriciously or whimsically. The sole question is whether it is in the interest of Justice to order a stay of proceedings and is it on what terms it should be granted. In deciding whether to Order stay of the Court should essentially weigh the pros and cons of granting or not granting the Order.”

(20) In deciding whether or not to refer a matter to mediation the court must weigh on the one hand its constitutional mandate to promote **ADR** as against, the duty of the court to ensure expeditious, fair and affordable disposal of suits as provided by **Section 1A, 1B and 3A** of the Civil Procedure Code.

(21) There is no contention on the fact that the loan agreement dated **30th October 2015** contained a clause for **ADR**. Although the Plaintiff/Applicants aver that this has not been explored, that is not strictly the case. I have closely perused the record of the proceedings that took place before my learned sister **Hon Justice Olga Sewe**. On **13th February 2018** the Hon Judge observed as follows:-

Court

The Court is obliged to promote ADR. In the premises the parties are hereby granted time to hold discussions on the viability of the proposed mediation before further direction can be given herein....”

(22) This was over one year ago. Clearly those discussions did not bear fruit. Further I note from the record that on **11th December 2017**, the Court directed that the Plaintiff continue paying the monthly instalments pending the hearing and determination of their application for stay. The Plaintiff/ Respondent did not comply. Even if they disputed the sum being claimed by the Defendant Bank, as a sign of good faith the Plaintiff/Applicant ought to have proceeded with monthly payments of the admitted debt as the loan itself was not disputed.

(23) On **9th March 2018** counsel for the Plaintiff/applicant informed the court that they had invoked the arbitration clause and sought to have the matter referred to arbitration. In declining that application the Judge cited the failure by the Plaintiffs to comply with the conditions for stay given by the court. The Judge then vacated the stay, and set down the application for inter parties hearing. From the above it is clear that mediation was tried but was found not viable. The Plaintiff while seeking that the matter be referred to arbitration failed to comply with the courts directives.

(24) In my view the question of referral to mediation is now **“res judicata”** having been determined by a Court of concurrent jurisdiction. In any event from 2018 to date the parties have had more than ample time to resolve this matter. The Plaintiff filed their Notice of Motion seeking a stay in November 2017, yet it was not until March 2019 (more than 1 ½ years later) that they filed this application. In the **KP & LC case** [supra], the court held that one of the conditions for a grant of stay was that the application has been brought expeditiously. This is clearly not the case here. The Plaintiff was comfortable to rest on the interim orders and stopped making any payments towards servicing the loan. It is only when court indicated its intention to hear the application inter partes when they now sought a reference to mediation.

(25) It is trite law that he who seeks equity must come with clean hands. The Plaintiff seeks a stay but at the same time are making no effort to service their loan facility as the Court directed. This is a clear demonstration of bad faith on the part of the Plaintiffs.

(26) As pointed out by counsel for the Defendant/ Respondent, this is a matter which has been in court since 2017. Parties have had ample time to seek resolution through **ADR** but have for the past year and a half failed to make any progress in this regard. To refer the matter to mediation now would merely prolong the expeditious disposal of the suit. Given the history of this matter it is unlikely that mediation will bear fruit. The Defendant continues to suffer prejudice due to financial loss as the loan is not being serviced. Based on the foregoing I decline to allow the application to refer this matter to mediation. I direct that the Notice of Motion dated **29th November 2017** be heard and determined inter partes.

Dated in **Nairobi** this ...**24th**day of **July 2019**.

.....

Justice Maureen A. Odero